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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 561

MARINE INSURANCE COMPANY, LTD.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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August 31, 1967.

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No.

MARINE INSURANCE COMPANY, LTD.,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on June 5, 1967.

Opinions Below

The order of the United States District Court and the memorandum of the United States District Judge endorsed on the notice of motion, printed in Appendix "A" hereto, *infra*, pages App. 1 to App. 3 (26a-27a)[1] is not otherwise reported. The opinion of the Court of Appeals for the Second Circuit, printed in

[1] Except as may otherwise be indicated, all numerical references with the suffix "a" are to the Appendix prepared for the use of the Court below, ten (10) copies of which have been filed herewith pursuant to Rule 21-1 and 4.

Appendix "B" hereto, *infra,* pages App. 4 to App 10 (90a-95a) has not as yet been reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was dated and entered June 5, 1967, Appendix "B" page App. 11, *infra* (96a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did Congress intend to provide the United States with an exemption from Federal Tort Claims Act liability in respect of a claim arising out of the loss of an airmail parcel containing emeralds valued at $152,190.00 while in the custody of United States Customs and while being used as bait in a Government scheme to entrap a thief, the United States not having been authorized by the owner to employ the goods for such purpose and the maximum amount of insurance available under parcel post agreement between Switzerland and the United States being in the amount of $330.00?

Statutes Involved

Title 28 U. S. C. § 1346 (b) pertinently reads:

> "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the

Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

* * * *

Chapter 171 of Title 28 U.S.C. § 2674 pertinently reads:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

* * * *

Chapter 171 of Title 28 U.S.C. § 2680 pertinently reads:

"The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) * * *

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

* * * *

Title 19 U.S.C. § 1499 reads in pertinent part:

> "Imported merchandise, required by law or regulations made in pursuance thereof to be inspected, examined, or appraised, shall not be delivered from customs custody, except under such bond or other security as may be prescribed by the Secretary of the Treasury to assure compliance with all applicable laws, regulations, and instructions which the Secretary of the Treasury or the Customs Service is authorized to enforce until it has been inspected, examined, or appraised and is reported by the appraiser to have been truly and correctly invoiced and found to comply with the requirements of the laws of the United States. The collector shall designate the packages or quantities covered by any invoice or entry which are to be opened and examined for the purpose of appraisement or otherwise and shall order such packages or quantities to be sent to the public stores or other places for such purpose.* * *"

* * * *

Statement of the Case

a. Proceedings below

The Complaint invokes the Federal Tort Claims Act, 28 U.S.C. 1346 (b), and seeks damages against the United States for loss of a package of emeralds worth $152,190.00 which disappeared while in the custody of the appraiser's stores, an instrumentality of the Bureau of Customs (3a through 5a).

Defendant in the District Court successfully moved for summary judgment dismissing the complaint for failure to state a claim upon which relief may be granted, the District Court having held that "the lost property was contained in a mail package excepted from the operation of the Tort Claims Act by the provisions of 28 U.S.C. Section 2684 (b) * * *" (26a). The District Court's determination was affirmed by the Circuit Court (Appendix "B", at page App. 11, *infra*).

b. Facts

On November 3, 1964, a 2 x 4 x 6 inch airmail package was mailed from Geneva, Switzerland, to a Manhattan importer, bearing shipping documents indicating that it contained six emeralds valued at $152,190.00. The package arrived by routine mail delivery at the 6th floor "Mail Division" of the United States Customs Building, 201 Varick Street, New York City on the morning of November 4th (10a, 11a, 20a-23a, 37a, 38a, 55a, 56a).

The United States Customs Mail Division is the point at which foreign mail is surrendered by the postal authorities to the customs authorities for inspection, fixing of duties and clearance prior to ultimate delivery to the addressee by the post office (81a, 82a). See, also 19 CFR 9 et seq. Revised as of January 1, 1964. Because of previous thefts at the Mail Division of valuable packages, at least one of which originated with the same Geneva shipper (35a, 36a), Edward Harris, a postal foreman, employed on that floor, decided to use this package in an attempt to trap and apprehend the suspected thief. Mr. Harris testi-

fied at the trial of Madell Collins[2] on this point as follows:

> "Well, we were looking to make a test and I recalled that Nanubhai lost a couple of packages the previous year and I thought that would be the right package to take since it was small and it was valuable and I decided to hold out on this one." (33a).

The investigators believed that a customs employee, Gennaro Ungaro, might have taken the previous lost packages (47a, 48a). In addition, the assistant United States Attorney who tried the Government's case in *United States* v. *Collins,* 349 F. 2d 863, CA 2 Docket No. 29772, represented to the district court that, in 1954, Collins was charged by customs authorities with the theft of merchandise at 201 Varick Street (89a).

On November 4, 1964, Harris gave the package to Postal Investigative Aide Washington (37a) who worked out of the General Post Office, 33rd Street and 8th Avenue, New York City. Mr. Washington received the package from Mr. Harris on the 6th floor of 201 Varick Street. He then took the package to Customs' Agent Martin McDonnell who photographed the parcel (37a, 38a). Accompanying the package was a declaration and a customs' invoice (37a, 38a). Washington then made a sketch of the parcel and took it from 201 Varick Street to Postal Inspector George Forster's office at the General Post Office and left it there in a cabinet overnight (38a, 39a). At the

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[2] The customs employee who was eventually convicted for unlawful possession of the package-in-issue.

same time he made copies of the two invoices and a description of the accompanying parcel (38a, 39a).

On Thursday, November 5, 1964, Washington prepared a syringe of fluorescent powder and brought it to Inspector Forster's desk where the latter injected the package with the powder (39a). The package was then taken by Forster and Washington to the registry section of the General Post Office and placed in a mailing bag with other packages labelled for delivery to 201 Varick Street (40a, 41a). Then Washington and Forster left the General Post Office building and went to the 6th floor of 201 Varick Street to await the arrival of the mail bag containing the package (42a thru 45a). It arrived a little after 1:00 o'clock on Thursday, November 5, 1964.

Washington and Forster were able to observe the arrival of the bag because they posted themselves in observation galleries covering the work floor of 201 Varick Street, on the 6th floor. These observation galleries overlook the work floor of the customs section (42a, 43a). At intervals along the wall of the gallery are louvres containing one-way glass, the outside of which is a mirror (43a).

Several customs' employees unloaded the skid upon which the bag was laden, opened the bag and put the contents into tubs (45a). They watched the tub from the observation galleries until 4:30 P.M. when Forster and Washington and Customs' Agent McDonnell went out on the work floor to look at the tub. At that time the parcel in question was in the tub in the same condition it had been in when Washington had originally put it into the mail bag (45a, 46a).

In the middle of the morning of Friday, November 6, 1964, Mr. Ungaro (a suspect, 47a, 48a) was seen working in the area of the tub and he reached the parcel in question and placed it into the jewelry tub (46a).

Binoculars were used from the observation galleries in order to follow the course of the package (46a).

The tub was then rolled up to another end of the building to another customs' employee, Mr. Smith (46a, 47a). Mr. Smith, who worked in the jewelry section of customs, took the package to Mr. Harris (34a), who checked the package to see that it was still secure and told Smith to put the package on Madell Collins' desk (34a, 35a). This was done slightly after 1 P.M. on Friday, November 6, 1964, *two and half days after the package first arrived at 201 Varick Street in the regular course of delivery.* The package remained on Mr. Collins' desk until he left work at 4:30 P.M., whereupon at 4:40 P.M. Traver Brown, a postal investigative aide, took the package from Collins' desk and put it in the vault for the week-end (49a, 50a).

Mr. Collins was employed by the United States Customs as one of the clerks in the Mail Division (56a, 57a) whose duties required the filling out of arrival forms for all incoming packages valued at over $250.00 (81a, 82a).[3]

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[3] "Formal entry at the customhouse shall be required for every importation in the mails which exceeds $250.00 in value * * * When a mail shipment is examined and found to be subject to formal entry, the addressee or consignee shall be notified on customs Form 3509 of the arrival of the shipment and of the port at which entry is to be made. * * *" 19 CFR 9.4, Revised as of January 1, 1964.

From an overhead observation post, Customs' Agent McDonnell observed Collins read the invoice attached to the package and then replace the package on his desk where it remained throughout the afternoon until moved by postal employee Brown as aforesaid (58a, 59a).

On Monday, November 9, 1964, Brown arrived at about 7:20 A.M., took the package from the vault and replaced it on Collins' desk (50a). Brown, under instructions from Inspector Forster, kept Collins and the package under observation while it was on Collins' desk (59a thru 83a).

At about 9:15 A.M. on Monday, November 9th, Gennaro Ungaro spoke to Collins during a coffee break (50a, 51a). Five minutes after the coffee break ended, Collins placed the package and two others on a chair next to his desk (51a).

The last time Brown saw the package was between 10:55 A.M. and 11:30 A.M. on November 9, 1964. Somewhere around that time he saw Collins get up and go toward the desk of a Mr. Hett. There was nothing on the chair. Two white parcels were in Collins' arms (51a, 52a). Brown did not see Collins take the package from the chair or from any place (52a, 53a).

During the course of its detention and until the time of its disappearance on November 9, 1964, the parcel was kept under surveillance by Washington, Forster, Brown, Harris and Customs' Port Investigators Bailey, Lorne and O'Brien (53a).

At approximately 2 P.M. on November 9, 1964, Brown notified Inspector Forster, who, in turn, relayed the information to Customs' Agent McDonnell and advised that Brown had last seen the package on Collins' desk at approximately 11:30 A.M. (59a, 60a, 83a, 84a).

Agent McDonnell then proceeded to the overhead observation post and watched Collins' movements until about 3:15 P.M. At about that time (approximately one hour before closing) McDonnell noticed that Collins had left the floor (62a thru 64a). An examination of Collins' work area confirmed that the package was missing (62a thru 64a).

Shortly after 4:30 P.M., Customs' Agent McDonnell was told by Collins' supervisor, Milton Stein, that Collins had left the building an hour early, having stated that he did not feel well (84a). Stein led agent McDonnell and Inspector Forster to Stein's outer office on the 6th floor where the work jacket which Collins wore that day was hanging on a rack (84a, 85a, 86a). McDonnell and Forster shined a portable ultraviolet lamp on the outside of the jacket and down into its open pockets. Without touching the jacket they were able to observe, glowing under the lamp's beam, two rubber bands and a piece of paper resting inside the right hand pocket (86a, 87a). McDonnell concluded that the rubber bands and paper were part of the inner wrappings of the missing parcel and removed them from the jacket (88a). This conclusion was supported by the testimony of Mrs. Junsili Gursel, an employee of the Geneva firm, who had made up the package and mailed it from Geneva (30a thru 33a).

That same evening (Monday, November 9th) at about 6 P.M. Customs' Agent McDonnell, Inspector Forster and other federal agents went to Collins' apartment (65a, 66a), whereupon Customs' Agent McDonnell advised Collins that a valuable parcel had been stolen from the building and that it had been last seen in Collins' possession (67a, 68a, 88a). Collins was taken to Varick Street for further interrogation (67a, 68a, 69a, 73a). Forster and McDonnell inspected Collins' hands and body with their ultraviolet lamp and observed powder traces (77a, 78a).

The missing emeralds have never been found and the appellant paid its assured the sum of $152,190.00 for their loss (10a, 11a, 12a).

Petitioner's assured mailed its package from Geneva to New York by parcel post, air mail, without having insured it with the Swiss Postal Administration (21a, 23a at line 25). Under the pertinent Parcel Post Agreement between Switzerland and the United States the maximum amount of insurance available to any mailer was $330 (Appendix "C", pp. App. 12-App. 17, *infra*).

Reasons for Granting the Writ

The Court of Appeals for the Second Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

That Circuit Court, itself, in affirming the District Court, refused to apply the ruling of a different panel of that Court which held that suit against the United States would lie for the mysterious disappearance of

a package from the same premises and in the same custody as the instant package of emeralds. *Alliance Assurance Company, Ltd.* v. *United States,* 252 F. 2d 529.

The only significant difference between the facts in the instant case and in the *Alliance Assurance Company Case, supra,* is that, in *Alliance,* the lost package did not have a postage stamp affixed to it. Petitioner submits that the lack or presence of a postage stamp on a package lost while in the custody of an agency other than the postal service is a distinction without a difference.

In reaching its decision below the Second Circuit relied upon and quoted (p. App. 9, *infra*) from the legislative history of the Legislative Reorganization Act of 1946, which commented on Section 2680 (b) of Title 28[4] as follows:

> "This section specifies types of claims which would not be covered by the title. They include . . . claims which relate to *certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available.* These exemptions cover *claims arising out of the loss or miscarriage of postal matter.* . . . S. Rep. 1400, 79th Cong., 2d Sess. 33 (1946) "(Emphasis supplied by the Circuit Court).

Thus, in reaching its decision the Circuit Court necessarily assumed that the petitioner had an ade-

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[4] Which excepts from the benefits of the Federal Tort Claims Act "Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."

quate remedy "already available", presumably insurance available through the postal service. But the maximum amount of insurance available to this petitioner's assured through the postal service was only $330 (Appendix "C", *infra,* at pp. App. 12-17), which is less than three/tenths of one per-cent of the value of the $152,190 package.

The Supplemental Memorandum of the United States, submitted to the Court of Appeals following oral argument, itself, concedes that when Congress excepted postal matter from the benefits of the Federal Tort Claims Act, Congress was of the belief that adequate postal insurance was available to all mailers.[5]

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[5] The pertinent portion of the Government's Supplemental Memorandum read:

> I. *Legislative History of the Postal Exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(b).*
>
> The Federal Tort Claims Act was enacted on August 2, 1946, as part of the Legislative Reorganization Act of 1964 [sic], c. 753, 60 Stat. 812. The Federal Tort Claims Act was discussed only briefly on the floor of Congress. The exception in the Act relating to postal matters, 28 U.S.C. §2680(b), was not mentioned. The briefs on this appeal (Appellant's at 13; appellee's at 5-6) include the only statement relating to the postal exception that was contained in the committee reports which accompanied the bill.
>
> The postal exception found in 28 U.S.C. §2680(b) was first proposed in virtually identical language as an amendment to an early proposed version of the Federal Tort Claims Act, S. 1912, 69th Cong. 1st Session (1926). See *United States* v. *Muniz*, 374 U.S. 150, 155 (1963).
>
> Section 8(a)(1) of S. 1912 was as follows:
>
> "Sec. 8.(a) The provisions of this title shall not apply to——
>
> (1) Any claim arising out of the loss or miscarriage or negligent transmission of letters or postal matter."*

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* 67 Congressional Record 11088, 69th Cong. 1st Sess. (1926).

The importance of this question of federal law becomes most apparent when we consider that the volume of dutiable mail passing through the Port of New York, alone, warrants the operation in that Port by Customs of a full-time "Mail Division" (7a). Other ports, of course, have similar facilities maintained by Customs (See e.g., Title 39 C.F.R. Part 151). When, as here, a mailer cannot effectively insure a valuable parcel with the postal authorities, he should certainly be equally entitled with non-mailing importers to sue the United States in an action "based on the negligent destruction, injury or loss of goods

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H.R. 667, which accompanied S. 1912, stated with respect to Section 8, at page 4:

"The purpose of subdivision (a) of this section is to exclude from consideration under this bill certain classes of claims for which satisfactory relief is available under existing law."

At that time, in addition to existing international postal agreements and conventions (see Point II below), existing law included the following statutes relating to claims for loss of mail:

39 U.S.C.A. § 381 (1928 ed.)—*System of registration; indemnity for loss of first-class matter.* (now 39 U.S.C. § 5001)

39 U.S.C.A. § 382 (1928 ed.)—*Payment of limited indemnity claims by postmasters* (now omitted, see 39 U.S.C. § 2204)

39 U.S.C.A. § 383 (1928 ed.)—*Indemnity for loss of third-class and fourth-class matter* (now omitted, see 39 U.S.C. § 5001)

39 U.S.C.A. § 244 (1928 ed.)—*Insurance of parcels and collection of postage* (now 39 U.S.C. § 5006)

None of the foregoing provisions for claims for indemnity for loss of mail were among the statutes repealed by Section 424 of the Federal Tort Claims Act, 60 Stat. at 846.

All of the above statutes are limited to indemnity for loss of mail that is either insured or registered. None of the above statutes authorize indemnity for loss of mail that is uninsured. Cf. *Nickola* v. *U.S. Government Post Office Department*, 137 F.

in the possession or control of the customs authorities * * *". See *Alliance Assurance Company, Ltd.* v. *United States,* 252 F. 2d 529 at p. 534.

Consequently it is particularly appropriate for this Court to exercise its jurisdiction and settle the law for the commercial community.

Supp. 943 (E.D. Mich.), *aff'd.*, 229 F.2d 737 (6th Cir. 1955), *cert. den.* 351 U.S. 908 (1956).

In 1946, when the Federal Tort Claims Act was enacted, the Department of the Army was authorized to pay claims for loss of registered or insured mail damaged, lost or destroyed by a criminal act while in the possession of the military, 31 U.S.C.A. § 223b (1927 ed., 1953 supp.), now 10 U.S.C. § 2733.

In 1960, authority was granted to Secretaries of the armed forces to pay claims for loss of registered or insured mail damaged, lost or destroyed by a criminal act while in the possession of the National Guard, 32 U.S.C. § 715.

Following 1926, the postal exception was carried forward in subsequent proposed versions of the Act, but received little comment. In 1940, Judge Alexander Holtzoff (then Special Assistant to the Attorney General) made the following statement at hearings before the Senate Committee on the Judiciary, S. 2690, 76th Congress, 3d Session, the bill then proposed for tort claims against the United States, at p. 38:

"Section 303 contains a list of claims that are to be excluded from the scope of the proposed legislation. There are 12 such classes.

The first is any claim arising out of the loss of, miscarriage, or negligence in the transmission of letters or postal matter. Every person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations. It would be intolerable, of course, if in any case of loss or delay the Government could be sued for damages. Consequently, this provision was inserted."

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted

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August 31, 1967.

APPENDIX "A"

Order of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Civ 594

MARINE INSURANCE COMPANY, LTD.,
Plaintiff,

—against—

UNITED STATES OF AMERICA,
Defendant.

Plaintiff having instituted the instant action seeking money damages for loss of property pursuant to the provisions of 28 U.S.C. Section 1346(b) and defendant having moved for summary judgment dismissing the complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted and the same having come on regularly to be heard before me and Robert M. Morgenthau, United States Attorney for the Southern District of New York, attorney for defendant, having appeared in support thereof and Hill, Rivkins, Louis & Warburton having appeared in opposition thereto and due deliberation having been had and it appearing that the lost property was obtained in a mail package excepted from the operation

of the Tort Claims Act by the provisions of 28 U.S.C. Section 2680(b) and a memorandum opinion having been filed on August 8, 1966, it is

ORDERED that the motion be granted in all respects and, it is further

ORDERED that the complaint be dismissed and, it is further

(87)

ORDERED AND ADJUDGED that defendant have judgment against the plaintiff for costs to be taxed by the clerk of this court.

August 30, 1966.

H. R. TYLER, JR.
U. S. D. J.

Judgment entered 8/30/66.

(Illegible)

Memorandum Endorsed on Notice of Motion

(17)

August 8, 1966

Defendant's motion for summary judgment is granted. Plaintiff as the subrogated insurer sues to recover the value of six emeralds concededly mailed from Geneva, Switzerland to New York City. The package was "temporarily withdrawn from its usual course . . ." and sent to Appraiser's Stores of the

Appendix "A"

Bureau of Customs on or about November 4, 1964. While there, the package disappeared on or about November 9, 1964, and the emeralds have not been recovered. (See *United States* v. *Collins,* 349 F.2. 863, (2d Cir., 1965) treating another aspect of this same mailing of emeralds). Plaintiff opposes this motion by arguing that the package lost its character as "mail" when it was diverted to the Bureau of Customs and thus does not come within the exception to the Tort Claims Act found in 28 USC 2680(b). Plaintiff's own Rule (9)g statement of the undisputed facts makes it plain that the package of emeralds did not lose its character as mail when diverted to the Bureau of Customs. *United States* v. *Collins, supra* at 866. *Alliance Assurance Company* v. *United States,* 252 F.2d 529, (2d. Cir., 1958), relied upon by plaintiff, is inapposite.

Settle order accordingly.

H. R. TYLER, JR.
U. S. D. J.

APPENDIX "B"

Opinion of U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 400—September Term, 1966.

(Argued April 6, 1967 Decided June 5, 1967.)

Docket No. 30943

MARINE INSURANCE COMPANY, LTD.,
Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

Before:

WATERMAN, FRIENDLY and ANDERSON,
Circuit Judges.

Appellant, insurer of a package air mailed from Switzerland to New York City sought money damages from the United States for loss of the package. The Government moved for summary judgment on ground that package was "postal matter" when lost, which motion was granted, United States District Court for

the Southern District of New York, Tyler, *J.*, and appellant's complaint was dismissed. Affirmed.

J. EDWIN CAREY, HILL, RIVKINS, WARBURTON, MCGOWAN and CAREY, Clare E. Walker, New York City, *for Plaintiff-Appellant.*

LAWRENCE W. SCHILLING, ALVIN H. MEADOW, RONALD P. HUNTLEY, DAWNALD R. HENDERSON, Asst. U. S. Attorneys; Robert M. Morgenthau, U. S. Attorney, *for Defendant-Appellee.*

WATERMAN, *Circuit Judge:*

This is an appeal from a judgment of the United States District Court for the Southern District of New York entered on an order granting a government motion for summary judgment and dismissing appellant's complaint for failure to state a claim upon which relief could be granted.

The Marine Insurance Company, Ltd. (Marine Insurance), a British insurer, insured a small package which contained six emeralds valued at $152,190 for the period of its transit by international air mail from Geneva, Switzerland to its intended receiver, an importer in New York. The package was mailed at Geneva and routinely arrived at the "Mail Division" of the United States Customs Building in New York City, a normal stop for international air mail packages. At this place mail packages are inspected and import duties on the contents are assessed. Because

the Mail Division had recently been the scene of the theft of a number of small valable packages, including some sent by the Geneva shipper who sent this package of emeralds, postal and customs investigators determined to use this package to trap the thief or thieves. To accomplish this they removed the package briefly from its normal progression through the Mail Division, treated it with a fluorescent powder, and then placed it in a registered mail bag with other packages, in order for it to pursue its normal course of routine processing through the "Mail Division" so as to obtain customs clearance prior to its postal delivery to the addressee. The package was then successfully kept under surveillance until it reached the work area of a customs' employee named Madell Collins where the investigators lost sight of it. Collins was later arrested and was prosecuted and convicted under 18 U. S. C. §1708 for unlawfully having in his possession stolen mail matter, the emeralds. Although the emeralds were never recovered, Collins was convicted on circumstantial evidence that proved he had possessed them in that the wrappings of the package were found in his possession and his body bore traces of the fluorescent powder. His conviction was affirmed by us, *United States* v. *Collins,* 349 F. 2d 863 (2 Cir. 1965).

Marine Insurance paid its insured, and thus being subrogated to this claim, seeks recovery from the United States pursuant to 28 U. S. C. §1346(b)[1] even

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[1] Section 1346(b) reads:

§1346. United States as defendant

* * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court

though by Section 2680(b)[2] of Chapter 171 of Title 28 of the U. S. Code no recovery under 28 U. S. C. §1346 (b) may be had on "any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." This defense was affirmatively asserted by the Government[3] and the United States moved for summary judgment.

The emeralds were in transit by mail from Switzerland to New York and disappeared because of a "loss, miscarriage, or negligent transmission" of them. Therefore appellant attempts to argue that the exemption from federal liability for losses of postal matter is not here applicable for the package containing them was not "postal matter" at the time of the loss. We

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for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[2] Section 2680(b) reads:

§2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * * *

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

[3] The Government also pleaded additional affirmative defenses: (1) That the loss arose out of a discretionary function of government employees within 28 U. S. C. §2680(a), another exception to 28 U. S. C. §1346(b), and (2) that the theft of the package did not result from any negligence on the part of the Government. The court below did not find it necessary to consider these defenses, nor do we.

disagree with appellant's position and affirm the holding below.

Appellant contends that because the package was stolen in the Mail Division of the Bureau of Customs it was in the temporary custody of that Bureau and thereby temporarily lost its character as postal matter. It cites language in *Alliance Assuranc Co.* v. *United States,* 252 F. 2d 529, 534 (2 Cir. 1958) indicating that 28 U. S.C. §2680(b) was designed to bar actions for losses occasioned by the handling of goods within the postal system and not to bar actions for loss or damage to goods while in the custody of a non-exempted agency. In *Alliance Assurance* the claimant sought a recovery for the disappearance from customs of imported goods which at no time were "postal matter." The issue presented here of whether postal matter entering the country from abroad ceases temporarily to be postal matter when in the temporary custody of customs authorities was not before the court in that case. Nevertheless the *Alliance Assurance* court points out in connection with the very language appellant relies on, 252 F. 2d 528, 534, that 28 U. S. C. §2680(b) was designed expressly to bar "actions 'arising out of the loss, miscarriage, or negligent transmission' of *mail.*" (Emphasis supplied.)

Appellant attempts a similar attack based on the "function" which the package was performing at the time of the loss. As we understand appellant, it argues that when the Bureau of Customs undertook to use the package for its own purposes in order to apprehend thieves, the package, while being so used, ceased to be postal matter and became something else; theorizing

that whether an item at any moment is "postal matter" is to be determined by whether the item is then being used for or is channelized within a proper postal function. We find nothing in the statute or in its legislative history to support this ingenious argument. The most pertinent comment on this problem in the legislative history of the Legislative Reorganization Act of 1946[4] was:

> This section specifies types of claims which would not be covered by the title. They include . . . claims which relate to *certain governmental activities which should be free from the threat of damage suit, or for which adequate remedies are already available.* These exemptions cover *claims arising out of the loss or miscarriage of postal matter.* . . . S. Rep. 1400, 79th Cong., 2d Sess. 33 (1946). [Emphasis supplied.]

Furthermore, even if we were to accept plaintiff's interpretation of the statute its argument would not apply to the facts of this case, for after treating the package with chemical powder the investigators returned it to the normal channels of mail. When stolen, the package was being processed in the same way it

---

[4] Act of Aug. 2, 1946, c. 753, 60 Stat. 812. Title IV of the Act was entitled Federal Tort Claims Act. Present 28 U. S. C. §1346(b) derives from Section 410 of that Act, and 28 U. S. C. §2680(b) derives from Section 421(b) of that Act. Prior versions of such a waiver of sovereign immuniy had been before Congress almost continually since 1926. The 1926 bill, S. 1912 of the 69th Congress, First Session, and each succeeding bill contained the postal exception in language virtually identical to that which finally appeared in Section 421, now codified as 28 U. S. C. §2680(b). See *United States* v. *Muniz*, 374 U. S. 150, 155 (1963). None of the legislative history of any of these bills supports appellant's contentions.

would have been processed if the inspectors had never singled it out for special surveillance. Although those committing this package to the postal system did not contemplate and probably would not have approved the use of their package as a decoy, they have no cause for complaint. The package was not stolen while exposed to any special risk. It had not been placed in an unusually vulnerable position but was stolen while it was in the normal flow of mail. There is every reason to believe that the theft would just as surely have occurred at the same desk if the package had not been first removed to treat it with the fluorescent powder and then replaced. Hence if there were ever to be a case for qualifying the general language of the statute, this would not be it.

Affirmed.

Appendix "B"

Judgment of U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of June one thousand nine hundred and sixty-seven.

Present: HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON, *Circuit Judges.*

MARINE INSURANCE COMPANY, LTD.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX "C"

(Appendix Attached to Governments' Supplemental Memorandum to the Court of Appeals)

Affidavit of Walter F. Sheble, Special Assistant to the Postmaster General for International Postal Affairs, sworn to on April 19, 1967:

Attachment A: Correspondence dated November 7, 1938.

Exhibit B: Correspondence dated December 28, 1938.

POST OFFICE DEPARTMENT
SPECIAL ASSISTANT TO THE POSTMASTER GENERAL
Washington, D.C. 20260

AFFIDAVIT

District of Columbia,
United States of America—ss.:

BEFORE ME, the undersigned Notary Public, duly qualified and commissioned in and for the District of Columbia, United States of America, personally came and appeared Walter F. Sheble, well known to me, who, after being by me first duly sworn, declared:

That, he is the Special Assistant to the Postmaster General for International Postal Affairs;

Appendix "C"

That in his capacity as such Special Assistant, he has custody and control of the files of the United States Post Office Department pertaining to parcel post conventions negotiated with foreign postal administrations;

That he has caused a search to be made of the files relating to the parcel post convention dated April 1, 1932, with Switzerland;

That such search shows that by letters dated November 7, 1938, No. 5360.8.6 from the Postal Administration of Switzerland; and, December 28, 1938, I C Cy-E179/2aux, from the United States Post Office Department, Switzerland and the United States agreed that effective January 2, 1939, the maximum amount for which a parcel mailed in Switzerland to the United States could be insured was increased to 1000 gold francs;

That no increase in the maximum 1000 gold francs limitation has since been made;

That Attachment A is a true translation of the aforesaid letter dated November 7, 1938, and Exhibit B is a true copy of the aforesaid letter dated December 28, 1938;

That the current conversion rate to American dollars of 1000 gold francs is $330.00;

That pursuant to the aforesaid Parcel Post Convention of 1932, as amended, the maximum amount for

which a parcel mailed in Switzerland to the United States may be insured for is 1000 gold francs or $330.00.

Further affiant sayeth not.

WALTER F. SHEBLE
Walter F. Sheble

SWORN TO AND SUBSCRIBED before me, Notary, at Washington, D. C., this 19th day of the month of April, A. D., 1967.

LAWRENCE B. GORDON
Notary Public
My Commission Expires May 14th, 1971.

(SEAL)

Attachment A

No. 5360.8.6 Berne, Nov. 7, 1938.

I have the honor to acknowledge receipt of your letter ICCy-E 179/2 aux, dated Sept. 23, 1938, and to inform you that the French and German Administrations, as transit countries, have advised me that they are now both in a position, in consideration of payment of the insurance fees required by the regulations, for land and sea transit, to assume responsibility beginning Jan. 2, 1939 up to the limit of 1000 gold francs for insured parcels in the case of dispatches from Switzerland to the USA and $200 in

the case of dispatches made in the opposite direction.

Under these circumstances, my Administration agrees with yours that the change in question be put into force on Jan. 2, 1939 in the two directions: Switz.-USA and vice-versa.

Beginning on that date, the terminal credit for the insurance fee to be paid by the dispatching Administration to that of destination by reason of Art. 16 of the P.P. Agreement concluded Apr.1/May 18, 1932 between our two Administration and Section 5, Ib and IIb of its Regulations of Execution, will be fixed at 10 gold centimos per parcel with insured value up to 500 gold francs ($100) and at 20 gold centimes per parcel with insured value from 500 up to 1000 gold francs ($200) exchanged between Switzerland and the USA.

Tr/E 11/16/38.

Appendix "C".

Exhibit B

I C Cy-E
179/2aux

December 28, 1938.

Director General of Posts and Telegraphs,
Berne, Switzerland.

My dear Sir:

By direction of the Postmaster General, I have the honor to refer to your letter of November 7, No. 5360.8.6, in which you agree to January 2, 1939, as the effective date of the increased amount of insurance (1000 gold francs or $200). Instructions have been issued in this service accordingly.

As you state, the terminal credit to be paid by the dispatching Administration to the Administration of destination will be:

10 gold centimes per parcel with insured value up to 500 gold francs.

20 gold centimes per parcel with insured value from 500 up to 1000 gold francs.

The insurance credits (including terminal and transit) for insured parcels for the United States possessions will be as follows:

For parcels for Alaska, Guam, Samoa, and Hawaii (also the Philippine Islands):

Appendix "C"

30 gold centimes per parcel with insured value up to 500 gold francs.

60 gold centimes per parcel with insured value from 500 up to 1000 gold francs.

For parcels for the Canal Zone, U. S. Virgin Islands, and Puerto Rico (also Guantanamo Bay):

20 gold centimes per parcel with insured value up to 500 gold francs.

40 gold centimes per parcel with insured value from 500 up to 1000 gold francs.

The Postmaster General directs me to express his appreciation for this successful conclusion of the negotiations to provide for the higher insurance in our parcel-post service.

Very truly yours,

For the Second Assistant Postmaster General.

J. E. LAMIELL,
Director.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 561

MARINE INSURANCE COMPANY, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order and memorandum of the district court (Pet. App. 1-3) are not reported. The opinion of the court of appeals (Pet. App. 4-10) is reported at 378 F. 2d 812.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1967. The petition for a writ of certiorari

was filed on August 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the instant suit was barred by the provision of the Federal Tort Claims Act relating to "[a]ny claim" for "loss" or "negligent transmission" of "postal matter".

STATUTES INVOLVED

28 U.S.C. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680(b) provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * *

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

* * * *

STATEMENT

On November 3, 1964, a package containing emeralds valued at $152,190, and insured by the petitioner, was mailed via parcel post, air mail, from Geneva, Switzerland, to an importer in New York City. The package arrived by routine mail delivery at the "Mail Division" of the United States Customs Building in New York City. At the Mail Division, a branch of the Bureau of Customs, customs officials inspect foreign mail and fix the duties on it pursuant to 19 C.F.R. 9.1, *et seq.* The only items processed there are mail parcels (R. 81a).[1] The Mail Division had recently experienced a series of thefts of valuable packages, and the postal and customs investigators working at the Mail Division decided that the package in question would be an appropriate one to use to trap the thieves. Accordingly, they removed the package temporarily from routine processing, took it to the General Post Office, and injected it with fluorescent powder. The package was then sent back to the Mail Division for completion of the normal processing procedure (R. 82a, 83a). Although efforts were made to keep the package under close surveillance, and teams of investigators were tracking its course, the investigators lost sight of the parcel after it reached the

[1] "R." refers to the pages of the Appendix prepared for the use of the Court below, 10 copies of which petitioner has filed with this Court.

work area of a customs employee named Madell Collins. Collins' duties included filling out arrival forms for all incoming mail parcels valued at more than $250 (R. 81a-82a). At that stage of processing the package disappeared. Although investigators discovered part of the wrappings of the parcel in Collins' work jacket, the emeralds were never recovered.[2]

After reimbursing its assured for the loss of the package, petitioner as subrogee of any claims brought this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), against the United States to recover the value of the emeralds. The government moved for summary judgment for failure to state a claim upon which relief may be granted, relying upon the exception in 28 U.S.C. 2680(b), which provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * *
>
> (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.[3]

The district court rejected petitioner's contention that this exemption does not apply to items in the custody of the customs authorities, and granted the motion

---

[2] Collins was subsequently arrested and prosecuted for the theft of the package, and he was convicted upon the evidence, *inter alia*, that his body bore traces of the fluorescent powder. The conviction was affirmed in *United States* v. *Collins*, 349 F. 2d 863 (C.A. 2), certiorari denied, 383 U.S. 960.

[3] The government had also raised the affirmative defense that the loss arose out of a discretionary function of government employees within 28 U.S.C. 2680(a) (R. 7a).

for summary judgment.[4] The court of appeals affirmed.

In holding that the package at issue was "postal matter" within the meaning of 28 U.S.C. 2680(b), the court of appeals pointed out that Congress did not intend that "mail" lose its character as "postal matter" when temporarily in the custody of the customs authorities. The Second Circuit went on to note that after the investigators had treated the package with the fluorescent powder, they returned it to the normal channels of mail, and it was not stolen until three days later. Thus,

> [w]hen stolen, the package was being processed in the same way it would have been processed if the inspectors had never singled it out for special surveillance. Although those committing this package to the postal system did not contemplate and probably would not have approved the use of their package as a decoy, they have no cause for complaint. The package was not stolen while exposed to any special risk. It had not been placed in an unusually vulnerable position but was stolen while it was in the normal flow of mail. There is every reason to believe that the theft would just as surely have occurred at the same desk if the package had not been first removed to treat it with the fluorescent powder and then replaced. Hence if there were ever to be a case for qualifying the general language of the statute, this would not be it. [Pet. App. 9-10.]

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[4] By stipulation, the record in *United States* v. *Collins*, *supra*, was before the court on this motion (R. 24a).

ARGUMENT

The court of appeals was clearly correct in holding the package to be "postal matter" within the meaning of 28 U.S.C. 2680(b). The package of emeralds had been mailed in Switzerland, had not yet reached its addressee in the United States, and was lost while undergoing routine processing along with other items of foreign mail in the Mail Division of the Customs Building. Furthermore, the evidence fully supports the finding that at the time the package was stolen it was in the normal flow of the mail, subject to no hazard greater than any other piece of mail, in as much as the package was stolen by Collins in the course of his duties of registering all parcels of mail valued at over $250. (R. 81a-82a).

1. Congress intended by 28 U.S.C. 2680(b) that activities of the government in performing postal services should be free from the threat of damage suits for the loss of mail; it did not intend that only activities of Post Office employees be protected. This scope is demonstrated by the language of the statutory provision, for it defines the exemption not in terms of the stage of processing or identity of employees involved when the item goes astray, but rather speaks in terms of the article which has been lost: "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." The statutory language makes no specific reference to Post Office employees. If Congress had intended to define the coverage of the exemption in terms of the employees who were handling the items, it knew

how to express exactly that, for the next exception in the Act, 28 U.S.C. 2680(c), is cast in precisely such terms:

> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise *by any officer of customs or excise or any other law-enforcement officer.* [Emphasis added.]

Especially when foreign mail is involved, employees of other federal agencies, such as the Bureau of Customs, are necessarily involved in the handling of the mail, and Congress certainly must have been aware of this. The manner in which Congress has defined the exemption in 28 U.S.C. 2680(b) clearly indicates a purpose to preserve the government's immunity from suit for claims arising out of any stage in the handling of mail; there is no conceivable reason why a package should cease to be "postal matter" while proceeding along an intermediate routing through customs authorities.

2. Petitioner claims a conflict with the prior decision of the court below in *Alliance Assurance Company, Ltd.* v. *United States*, 252 F. 2d 529 (C.A. 2). In that case a cargo of foreign woolens was shipped (not mailed) to New York; upon arrival, the goods were placed in a warehouse in the United States Customs Building for processing by the customs officials. The goods mysteriously disappeared from the warehouse and were never recovered. The court of appeals held that there was jurisdiction under the Federal Tort Claims Act and that the exemption in 28 U.S.C.

2680 (*c*), *supra*, p. 7, dealing with detention of goods by customs officers, did not apply. The court emphasized that since the goods involved there were not being sent by mail and were not being handled by the postal system, the issue did not involve subsection (b). See F. 2d at 534.

Actually in point is the Second Circuit's decision in *United States* v. *Collins*, 349 F. 2d 863 (C.A. 2), certiorari denied, 383 U.S. 960, the case in which Madell Collins was convicted of the theft of the very package involved here. The court of appeals there affirmed Collins' conviction for theft of "mail" in violation of 18 U.S.C. 1708. It explicitly rejected Collins' argument that the package had lost its character as mail because it was used as a decoy and was in the custody of customs, rather than Post Office, employees. See 349 F. 2d at 866.

The decision below is consistent with the Second Circuit's prior decisions, does not conflict with the decision of any other circuit, and is clearly correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
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Attorneys.

SEPTEMBER 1967

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SUPREME COURT, U. S.

OCT 9 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 561

MARINE INSURANCE COMPANY, LTD.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY

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October 6, 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 561

MARINE INSURANCE COMPANY, LTD.,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY

United States v. *Collins*, A CASE BROUGHT UNDER CRIMINAL STATUTES, IS INAPPOSITE

Respondent, in its brief in opposition (at p. 8), mistakenly claims that *United States* v. *Collins*, 349 F. 2d 863 (C.A. 2), cert. den., 383 U.S. 960, is in point. There is no sound basis for such an assertion.

Although the package may have been mailed within the mail theft statute, the claim arises out of negligence involving an activity and function not immune to suit.

In *United States* v. *Collins* (24a), the Second Circuit was not concerned with the same question of law as here presented. There, *for the purposes of the criminal statute*, the Court held that Collins' desk was

a "mail route or other authorized depository for mail matter". 349 F. 2d at 866, citing 18 U.S.C. 1708. It is submitted that the criminal statute is broader than the Tort claims *exception* (cf. 28 U.S.C. 2680(b) and 18 U.S.C. 1708).[1]

Where a mail truck accident is involved,[2] the mere fact that mail is being carried does not preclude suit where the loss arises out of other than the fact that mail is aboard the negligent vehicle. The fact that mail may be involved is merely a coincident to the claim. *The placing of a postage stamp on an article, of itself, does not preclude all suit against the Government.*

For instance: it is submitted that if, in this very case, the Government authorities had succeeded in locating the package and then turned the package over to be "Exhibit A" against Collins in his trial, and then, after the trial, failed to return the package to plaintiff upon demand, suit would lie. *Otten* v. *United States,* 210 F. Supp. 729, *supra.*

Clearly must we carefully consider the entire scheme of the Tort Claims Act in applying any of its exceptions. Customs activity cannot be held to be immune

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[1] Or, to put it the other way the "Federal Tort Claims Act • • • a sweeping, comprehensive measure enacted in accordance with modern progressive trends to waive Governmental immunity • • • should receive a broad and liberal construction." *Slater* v. *Keleket X-ray Corp.,* 172 F. Supp. 715 at p. 717 (D.C. D. C., 1959) citing *U.S.* v. *Aetna Cas. & Surety Co.,* 338 U.S. 366, 383, i.e., the Act should be broadly construed while the exceptions thereto should be narrowly construed.

[2] e.g., *Rudd* v. *United States,* 233 F. Supp. 730 (D.C. Ala., 1964); *Cline* v. *United States,* 214 F. Supp. 66 (D.C. Tenn., 1962).

from suit just because Customs was also an authorized depository for the mail. That it was mail, was incidental. That the package was lost while Customs undertook to handle it is critical. We must distinguish protected activities and functions from vulnerable ones.

Conclusion

For the reasons recited above and in petitioner's moving brief, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 6, 1967.